to the effect that the husband's parts were anatomically normal and that he was apparently capable of performing the act of generation and that the wife was found to be *virgo intacta,* and that there was no impediment on her part to prevent consummation of the marriage.

Francis T. Seow for the petitioner addressed on two propositions, *viz:*

(1) Consummation as understood in law, and

(2) The law of impotence with emphasis on the doctrine of *impotentia quoad hunc vel hanc.*

On his first proposition he submitted that consummation in the proper meaning of the term is ordinary and complete sexual intercourse. The former Ecclesiastical Courts described it as *vera copula* but whatever definition is used, two essentials must be present before there can be consummation in law. There must be (a) *erectio* and (b) *intromissio.* Nothing less will do. It has been held that the possibility of incipient or imperfect coitus is not enough to establish consummation. Vide *R. v. R.*[1] at p. 1197, where the learned Judge quoted Dr. Lushington in *D-e v. A-g*[2] :—

"If there be a reasonable probability that the lady can be made capable of a *vera copula* — of the natural sort of coitus, though without power of conception — I cannot pronounce this marriage void. If, on the contrary, she is not and cannot be made capable of more than an incipient, imperfect, and unnatural coitus, I would pronounce the marriage void"

and at p. 1198:

"Therefore, in my view, *vera copula* consists of *erectio* and *intromissio.* This is the view of the author in **Jackson on the Formation and Annulment of Marriage** from which I have derived considerable assistance. At pp. 209 and 210 the learned author says: 'Contraceptive devices do not prevent intercourse — *Vera copula* consists of *erectio* and *intromissio.* Once this has been achieved, the fact that consummation, in the sense of potential conception, has been made impossible by the use by one or both of the parties of contraceptives, is irrelevant. Only intercourse in the sense of *vera copula* is necessary to 'consummate' a marriage. A person is in law impotent who is *incapax copulandi,* apart from the question of whether he or she is *incapax procreandi*'."

He then turned to his second proposition. Impotence is therefore the physical inability of a man or woman to perform the act of sexual intercourse. It appears from the medical evidence that the respondent is normal in that there is no apparent physical defect to prevent or hinder the consummation of the marriage by him. But for that matter so is the petitioner.

He submitted that the doctrine of *quoad hanc* applies. That is to say, a person may be generally capable of performing the act of coition and yet incapable of performing it with a particular individual, *quoad hunc vel hanc,* owing to certain causes. Vide *Latey* (14th Ed.) at p. 197, and said :—

"Your Lordship has heard from the petitioner of the respondent's attempt to effect his conjugal rights: and my submission is reinforced by the fact that the petitioner is *virgo intacta* after the parties have cohabited together for about 2 years before the petitioner finally left him. My submission is further reinforced by the learned editor of **Rayden** on Divorce (6th Ed.) at p. 88 to the effect that where a marriage remains unconsummated and both man and woman appear to be capable, there is a presumption that the incapacity must be imputed to the man."

He then cited 2 cases: *G. v. G.*[3] (Counsel then read out the facts of the case) and then quoted *G. v. G.*[3] (*ibid.* at p. 174) where the learned Judge said :—

"Their stories are absolutely inconsistent, but that is immaterial, if I am satisfied that, *quoad hanc et quoad hunc,* these people cannot consummate the marriage. If for some reason which is not quite clear but in fact, the Court is satisfied that the marriage cannot be consummated, then the Court is entitled to annul the marriage and not tie the two people together for the rest of their lives in a state of misery"

and *Kay v. Kay*[4] where the marriage was never consummated as the husband made no attempt to consummate it; and the woman was found to be *virgo intacta* through no fault of her own after a *triennial* cohabitation, non-consummation was attributed by law to the husband and the onus was on the man to rebut the presumption.

The respondent, he observed had done nothing to disprove these allegations. It was for the respondent to rebut the presumption, if he could; and it was a heavy onus if he chose to assume it — but he saw fit to content himself with entering an appearance limited to costs.

Tan Ah Tah J. pronounced a decree *nisi.*

Solicitors: *Tan, Rajah & Cheah*

TAN ENG SENG v. TEO SOON KIAT & ORS.

[O. C. J. (Whyatt C.J.) May 18, 1956]

[Singapore — Civil Suit No. 370 of 1955]

Landlord and Tenant — Control of Rent Ordinance, 1953 — Statutory tenant — Whether statutory tenant can sublet the whole of the premises — Doctrine of non-occupation.

The plaintiff in this case was the owner of the premises known as No. 119 Beach Road which were let to one Ng Guat Neo at a monthly rent of $120. Ng Guat Neo sublet the ground floor to one Tan Cheok Chua, the proprietor of Nam Ah & Co., the third defendant in this case at a monthly rent of $120 which included the cost of light, water and use of telephone. In September 1953 the plaintiff served a notice to quit on the chief tenant which expired on October 31, 1953. The third defendant remained in possession and continued to pay $120 per month to the chief tenant. In 1954 the chief tenant became ill and left the premises. Before she left she entered into a new arrangement with the third defendant whereby she gave him possession of the first floor in addition to the ground floor at the rent of $132 per month in place of the ground floor only at the rent of $120 per month, inclusive of light, water and telephone. The plaintiff claimed possession of the premises.

Held: (1) after the termination of the chief tenant's contractual tenancy the third defendant became a statutory tenant of the ground floor holding the premises from the chief tenant on the terms of the former contractual sub-tenancy so far as the same were consistent with the

Control of Rent Ordinance; (2) the effect of the agreement entered into between the third defendant and the chief tenant in 1954, was that the third defendant surrendered the statutory tenancy of the ground floor of the premises and therefore the tenancy ceased as from the date of agreement; (3) where a statutory tenant sublets the whole of the premises, he loses his statutory tenancy by non-occupation and consequently he is unable to confer any rights upon the sub-tenant; (4) therefore in this case the third defendant did not acquire any rights under the Control of Rent Ordinance as a result of the new arrangement with the chief tenant, and so far as the plaintiff, as landlord, was concerned, he was merely a licensee; (5) as the plaintiff had already obtained an order against the chief tenant for possession of the premises, he was entitled to a further order for possession against the third defendant.

Cases referred to:—

(1) *Guan Seng Kee Ltd. v. Buan Lee Seng Ltd.* (1954) M.L.J. 34.

(2) *Nightingale v. Courtney* (1954) 1 Q.B. 399.

(3) *Roe v. Russell* (1928) 2 K.B. 117.

(4) *Haskins v. Lewis* (1931) 2 K.B. 1.

(5) *Oak Property Co. Ltd. v. Chapman* (1947) K.B. 886.

CLAIM for Possession.

C. H. Smith and *Wee Chong Jin* for the plaintiffs.

T. S. Sinnathuray for the third defendant.

Cur. Adv. Vult.

Whyatt C.J. : — The plaintiff is the owner of premises known as 119 Beach Road, Singapore which were let to a certain Ng Guat Neo several years ago at a monthly rent of $120. The details of the tenancy were not proved in evidence but it was agreed that it contained no clause against assigning or sub-letting. The premises consisted of a ground floor and a first floor and on the 16th June 1950, Ng Guat Neo, whom I will call the chief tenant, sublet the ground floor to Tan Cheok Chua, the proprietor of a firm named Nam Ah & Co., who is the defendant in these proceedings, at a monthly rent of $120 which included the cost of light, water and the use of the telephone. Some three years later in September 1953, the plaintiff served a notice to quit on the chief tenant which expired on the 31st October 1953 and it is common ground that as from that date she became a statutory tenant of the premises. The termination of the chief tenant's contractual tenancy necessarily had the effect of terminating the contractual sub-tenancy of the defendant but he remained in possession, paying $120 per month to the chief tenant as he had done for the past three years. It seems clear from the decision of the Privy Council in *Guan Seng Kee Ltd v. Buan Lee Seng Ltd.*[1] that after the termination of the chief tenant's contractual tenancy, the defendant became a statutory tenant of the ground floor holding the premises from the chief tenant on the terms of the former contractual sub-tenancy so far as the same were consistent with the Control of Rent Ordinance. The position, therefore, on the 31st October 1953 was that the chief tenant was a statutory tenant of the whole of the premises and was paying a rent of $120 per month to the plaintiff but was in actual occupation only of the first floor, and the defendant was a statutory tenant of the ground floor for which he was paying $120 per month, inclusive of light, water and telephone, to the chief tenant.

This state of affairs continued until August 1954 when the chief tenant became ill and left the premises and went to live with relatives. Before she left, however, she entered into a new arrangement with the defendant whereby she gave him possession of the first floor in addition to the ground floor at a rent of $132 per month in place of the ground floor only at a rent of $120 per month, inclusive of light, water and telephone.

The first question to be determined is the proper conclusion, as a matter of law, to be drawn from this new arrangement. If the matter fell to be considered at common law, there could be no doubt that it would amount to a surrender by operation of law of the old sub-tenancy of the ground floor and the creation in its stead of a new sub-tenancy at a new rent of the ground floor and the first floor. In cases where the sub-tenant is a statutory tenant, however, the position is somewhat different since a statutory tenant's right to remain in possession is derived from statute. Can a statutory tenant surrender this right by agreement with his lessor or is he debarred from contracting out from the protection which the Ordinance gives him as a statutory tenant? This matter was raised in principle in the case of *Nightingale v. Courtney*[2] where a statutory tenant of a part of a house, entered into a contract to purchase the leasehold reversion of the whole house and remained in possession without paying rent pending completion of the sale. Subsequently, when the contract of purchase was rescinded, the lessor contended that the statutory tenancy had been surrendered and consequently the defendant had remained in possession as a mere licensee while awaiting completion of the sale. The Court of Appeal held on the facts of that particular case that there had not been any surrender but it is clear from the judgments, in particular from the judgment of Romer L.J., that there is nothing in law to prevent a statutory tenant surrendering his statutory tenancy; in the words of the learned Lord Justice, "I can see no reason why the position should be in any way different when the tenancy is a statutory tenancy. It seems to me that the question of surrender or no surrender is one of intention of the parties, to be discovered from the terms of the contract into which they have entered" Applying this principle to the agreement entered into

between the defendant and his chief tenant in August 1954, it seems to me clear that it was the defendant's intention to surrender the statutory tenancy of the ground floor of these premises and accordingly that tenancy ceased as from the date of the agreement.

Then comes the second question: what rights did the defendant acquire under the new arrangement? It is quite clear that he could not acquire any rights at common law, since the chief tenant, being herself a statutory tenant as I have already mentioned, had no legal estate out of which she could grant a common law tenancy of any kind. Unless, therefore, the defendant can establish that this new sub-letting gave him the status of a statutory tenant, his position could not be better than that of a licensee. The effect of sub-letting by a statutory tenant of premises within the United Kingdom Rent Restrictions Acts was considered in the English cases of *Roe v. Russell*[3] and *Haskins v. Lewis*[4] to which Mr. Sinnathuray, in his careful argument, drew the Court's attention, and it was clearly laid down in those cases that a sub-letting by a statutory tenant of part of his premises would confer upon the sub-tenants the protection of the Acts, notwithstanding that the statutory tenant had no legal estate out of which he could make a grant to his sub-tenants. Those decisions turn upon the construction of the provisions of the United Kingdom Acts and it does not follow, nor is it necessary to decide in this case, that they would apply to the Control of Rent Ordinance 1953, which, although in some respects *in pari materia* with the United Kingdom Acts, nevertheless differs materially in the wording of many of its provisions.

There is, however, no case where the English Courts have decided that if a statutory tenant sub-lets the whole, and not merely part, of the premises, the sub-lessee becomes a statutory tenant. Mr. Sinnathuray contended that this question was expressly reserved by that great authority on the Rent Restriction Acts, Lord Justice Scrutton, in his judgment in *Roe v. Russell*[3] at page 130 but with respect to Mr. Sinnathuray's argument, it seems to me clear that the point with which the learned Lord Justice is there dealing is the position of several sub-tenants where the statutory tenant has, by a series of sub-lettings, parted with the whole of the premises which he holds as statutory tenant and not with the case of a statutory tenant who has parted with the whole of the premises to a single sub-lessee. Moreover, the point Lord Justice Scrutton was considering arose on the particular wording of section 4, sub-section 1(h) of the Rent Restriction Act 1923 which has no counterpart in the Control of Rent Ordinance 1953. The case of a sub-letting of the whole of the premises to a single sub-lessee was discussed in *Oak Property Co. Ltd. v. Chapman*[5] and it would seem that the true principle is that a statutory tenant can only confer rights upon a sub-tenant so long as he retains possession of some part of the premises, and therefore if he parts with possession of the whole, he loses all his interest in the premises and consequently cannot confer any rights on his sub-tenant as against the head landlord. It will be seen that this principle is based, not upon any special wording of the Acts, but upon what I may call the doctrine of non-residence which has been gradually developed by the Courts in the United Kingdom. In my opinion the same doctrine applies to the Control of Rent Ordinance 1953 except that it is more accurate to refer to it as the doctrine of non-occupation rather than non-residence since the Ordinance covers occupation of business as well as residential properties. The conclusion, therefore, which I have reached is that, whatever may be the position when a statutory tenant sub-lets only part of the premises, where he sub-lets the whole, he loses his statutory tenancy by non-occupation and consequently he is unable to confer any rights upon his sub-tenant. It follows, that the defendant did not acquire any rights under the Ordinance as a result of the new arrangement with the chief tenant and therefore, so far as the plaintiff, as head landlord is concerned, he is merely a licensee. The plaintiff has already obtained an order in these proceedings against the chief tenant for possession of these premises and as a result of my finding that the defendant is a mere licensee he is now entitled to a further order for possession against the defendant.

That is sufficient to dispose of this case. I should, however, mention that the plaintiff put forward, as an alternative ground for possession, that the defendant had been overcharging his sub-tenants contrary to the provisions of section 15(1)(g). The defendant contended that this provision applies only where a tenant overcharges his sub-tenants and not where a sub-tenant overcharges his sub-tenants. It seems clear, however, from the definition of "tenant" in section 2 that it can be construed to apply to a sub-tenant who receives excessive rents no less than to a tenant who does so. There are, however, obvious difficulties in allowing, not a *mesne* landlord, but a head landlord, as in the present case, to rely upon this provision as against a sub-tenant. It is by no means clear, for instance, whether the head landlord could rely upon a sub-tenant overcharging his sub-tenants as a ground for an order for possession, if the chief tenant had committed no breach and therefore still retained a right to possession of the whole of the premises. These difficulties were not referred to in the plaintiff's argument and I reserve my judgment on them. In view, however, of the conclusion I have reached on the first head, the plaintiff's

claim succeeds and there must be judgment for him with costs.

Claim allowed.

Solicitors: *Wee Swee Teow & Co.; Oehlers & Choa.*

In re AN APPLICATION BY LOKE WAN THO

[O. C. J. (Whyatt C.J.) June 15, 1956]
[Singapore — Originating Motion No. 4 of 1956]

Certiorari — Application for order of certiorari against the City Council — Whether proceedings of City Council are analogous to a judicial process — R.S.C., O. 59, rr. 4 & 5(2). English

This was an application for an order of *certiorari* to remove certain resolutions of the City Council, Singapore, into the Court and have them quashed. The preliminary point was raised and argued, as to whether the order of *certiorari* lies to the City Council in the circumstances alleged in the case.

Held: (1) *certiorari* will not lie to bodies other than Courts *stricto sensu*, unless their jurisdiction is regulated by analogy to judicial rules; (2) the proceedings of the City Council were in no way analogous to the judicial process and therefore they are not amenable to review or avoidance by the procedure of *certiorari*.

Obiter: The learned Chief Justice also ruled: (1) the provisions of Order 59 r. 4 of the Rules of the Supreme Court relating to the framing of issues of facts to be tried on oral evidence should not be applied to proceedings such as *certiorari* on the Crown side; (2) similarly, the Court should not allow cross-examination on affidavits in Crown proceedings unless the circumstances are very exceptional.

Semble: R.S.C., O. 59 r. 5(2) provides that persons directly affected are to be served. It is therefore not necessary to serve persons who are only indirectly affected in the sense that allegations of bias are made against them.

Cases referred to:—

(1) *Nakkuda Ali v. Jayaratne* (1951) A.C. 75.
(2) *R. v. Hendon Rural District Council, Ex parte Chorley* (1933) 2 K.B. 696.
(3) *R. v. Kent Justices, Ex parte Smith* (1928) W.N. 137.
(4) *R. v. Stokesley Yorkshire Justices, Ex parte Bartram* (1956) 1 W.L.R. 254.
(5) *Frome United Breweries v. Bath Justices* (1926) A.C. 586.
(6) *R. v. London County Council, Ex parte Akkersdyk* (1892) 1 Q.B. 190.

APPLICATION for *Certiorari.*

K. Gould for the applicant.

R. H. Green for the City Council.

M. B. Brash for Sim Beng Seng.

Cur. Adv. Vult.

Whyatt C.J.: — The facts of this case need no elaborate examination inasmuch as the only question to be decided is whether or not in the circumstances of the case an order of *certiorari* will lie at all. I confine myself, therefore, to such a brief statement of the facts as is necessary to illustrate and render intelligible the conclusion which I have reached on the issue of law.

On the 29th March 1955 the *Ad Hoc* Planning Committee of the Singapore City Council approved the application of Mr. Loke Wan Tho (the applicant in these proceedings) for the erection of a cinema at 5 East Coast Road, Singapore and this decision was confirmed at a meeting of the full Council on the 29th April 1955. Subsequently the applicant submitted plans of the proposed cinema to the City Council and on the 16th November 1955 the Building Committee of the Council approved the issue of a Certificate of Fitness for the new cinema under the Theatre, Cinema and Entertainment By-Laws and this decision was confirmed by a majority of the Council at their meeting on the 30th November 1955. A few days later, on the 3rd December, a City Councillor, by name, Lee Choon Eng, gave notice of a motion proposing that the Council's decision to issue a Certificate of Fitness should be rescinded and this was followed on the 20th December by notice of another motion by Councillor Sim Beng Seng, proposing that the Council's decision confirming the *Ad Hoc* Planning Committee's decision should likewise be rescinded.

These two motions were moved and seconded at the next Ordinary meeting of the Council on the 30th December 1955 and were carried by a majority, the voting being eleven votes to nine in favour of the motions and two abstentions. The decisions of the Council arrived at as a result of these motions are recorded in the minutes of the Council's proceedings in the following terms:—

Resolved that the Council rescind the following decision

'Formally reported by the **Ad Hoc** Planning Committee, pursuant to delegated authority the following decision which has the concurrence of the Singapore Improvement Trust Planning Committee so far as its interests are concerned, and which were made at a joint meeting on the 29th March 1955:—

Approved unanimously under By-Law (1)(B) of the Theatre, Cinema and Entertainment By-laws and the Siglap Bungalow Area By-laws, the erection of a cinema on Lot 77-9 Mukim 26 East Coast Road subject to

(1) Compliance with the requirements (if any) of the Traffic Police and
(2) Submission and approval of satisfactory Building plans in compliance with Municipal Ordinance and By-laws made thereunder.'

Resolved that:—

'The decision which was confirmed at the Ordinary Meeting of the City Council on the 30th November 1955, which reads:—

Approved by a majority of four votes to three (the Chairman exercising his casting vote and Messrs. Simon, Oli Mohamed and Jaganathan dissenting) the issue of a Certificate of Fitness, under the Theatre, Cinema and Entertainment By-Laws (except By-Law IB, under which approval has already been granted by the Council's **Ad Hoc** Planning Committee) for a new Cinema Building on Lot No. 77-9, East Coast Road, as set out in Building Plan No. 288/55,'

be rescinded.